



Billing Code 4410-02-P

DEPARTMENT OF JUSTICE

28 CFR Part 16

CPCLO Order No. 013-2012

Privacy Act of 1974; Implementation

AGENCY: Federal Bureau of Investigation, Department of Justice.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: Elsewhere in the Federal Register, the Federal Bureau of Investigation (FBI), a component of the Department of Justice, has published a notice of a new Privacy Act system of records, JUSTICE/FBI-022, the FBI Data Warehouse System. In this notice of proposed rulemaking, the FBI proposes to exempt this system from certain provisions of the Privacy Act in order to avoid interference with the national security and criminal law enforcement functions and responsibilities of the FBI. Public comment is invited.

DATES: Comments must be received by [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESS: Address all comments to the Privacy Analyst, Privacy and Civil Liberties Office, National Place Building, 1331 Pennsylvania Ave., NW., Suite 1000, Washington, DC 20530-0001 or facsimile 202-307-0693. To ensure proper handling, please reference the CPCLO Order No. on your correspondence. You may review an electronic version of the proposed rule at <http://www.regulations.gov> and you may also comment by using the

<http://www.regulations.gov> comment form for this regulation. Please include the CPCLLO Order No. in the subject box.

Please note that the Department is requesting that electronic comments be submitted before midnight Eastern Daylight Savings Time on the day the comment period closes because <http://www.regulations.gov> terminates the public's ability to submit comments at that time. Commenters in time zones other than Eastern Time may want to consider this so that their electronic comments are received. All comments sent via regular or express mail will be considered timely if postmarked on the day the comment period closes.

Posting of Public Comments: Please note that all comments received are considered part of the public record and made available for public inspection online at <http://www.regulations.gov> and in the Department's public docket. Such information includes personally identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personally identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase "PERSONALLY IDENTIFYING INFORMATION" in the first paragraph of your comment. You must also place all personally identifying information you do not want posted online or made available in the public docket in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online or made available in the public docket, you must

include the phrase “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted online or made available in the public docket.

Personally identifying information and confidential business information identified and located as set forth above will be redacted and the comment, in redacted form, will be posted online and placed in the Department’s public docket file. Please note that the Freedom of Information Act applies to all comments received. If you wish to inspect the agency’s public docket file in person by appointment, please see the **FOR FURTHER INFORMATION** paragraph.

FOR FURTHER INFORMATION CONTACT: Kristin Meinhardt, Assistant General Counsel, Privacy and Civil Liberties Unit, Office of the General Counsel, FBI, Washington, DC 20535-0001, telephone 202-324-3000.

SUPPLEMENTARY INFORMATION: In the Notice section of today’s Federal Register, the FBI has established a new Privacy Act system of records, the FBI Data Warehouse System, Justice/FBI-022. The system serves as a repository for FBI information and for information lawfully received from other agencies and permits the comparison of data sets in order to provide a more complete picture of potential national security threats or criminal activities. The FBI is also deleting the system of records notice for the Data Integration and Visualization System (DIVS), published at 75 FR 53342 (Aug. 31, 2010) and modified at 75 FR 66131 (Oct. 27, 2010) because the Data Warehouse System will now also cover information that was covered by the DIVS SORN.

In this rulemaking, the FBI proposes to exempt the Data Warehouse System, Justice/FBI-022, from certain provisions of the Privacy Act in order to avoid interference with the law enforcement, intelligence and counterintelligence, and counterterrorism responsibilities of the FBI as established in federal law and policy. The FBI is also replacing the exemption regulation for DIVS with this proposed rule because that system will now be covered by Justice/FBI-022 and this proposed rulemaking. The exemption regulation for DIVS will stay in effect until this rule is final.

Regulatory Flexibility Act

This proposed rule relates to individuals rather than small business entities. Pursuant to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601-612, therefore, the proposed rule will not have a significant economic impact on a substantial number of small entities.

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, 5 U.S.C. 801 et seq., requires the FBI to comply with small entity requests for information and advice about compliance with statutes and regulations within FBI jurisdiction. Any small entity that has a question regarding this document may contact the person listed in FOR FURTHER INFORMATION CONTACT. Persons can obtain further information regarding SBREFA on the Small Business Administration's Web page at http://www.sba.gov/advo/archive/sum_sbrefa.html.

The Paperwork Reduction Act

The Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d), requires that the FBI consider the impact of paperwork and other information collection burdens imposed on

the public. There is no current or new information collection requirements associated with this proposed rule. The records that are contributed to this system are created by the FBI or other law enforcement and intelligence entities and sharing of this information electronically will not increase the paperwork burden on the public.

Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 103-3, 109 Stat. 48, requires Federal agencies to assess the effects of certain regulatory actions on State, local, and tribal governments, and the private sector. UMRA requires a written statement of economic and regulatory alternatives for proposed and final rules that contain Federal mandates. A “Federal mandate” is a new or additional enforceable duty, imposed on any State, local, or tribal government, or the private sector. If any Federal mandate causes those entities to spend, in aggregate, \$100 million or more in any one year, the UMRA analysis is required. This proposed rule would not impose Federal mandates on any State, local, or tribal government or the private sector.

List of Subjects in 28 CFR Part 16

Administrative Practices and Procedures, Courts, Freedom of Information Act, and the Privacy Act.

Pursuant to the authority vested in the Attorney General by 5 U.S.C. 552a and delegated to me by Attorney General Order 2940-2008, it is proposed to amend 28 CFR Part 16 as follows:

PART 16--[AMENDED]

1. The authority citation for part 16 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a, 552b(g), 553; 18 U.S.C. 4203(a)(1); 28 U.S.C. 509, 510, 524; 31 U.S.C. 3717, 9701.

Subpart E --Exemption of Records Systems Under the Privacy Act

2. In § 16.96, revise paragraphs (v) and (w) to read as follows:

§ 16.96 Exemption of Federal Bureau of Investigation Systems – limited access.

* * * * *

(v) The following system of record is exempt from 5 U.S.C. 552a(c) (3) and (4); (d)(1), (2), (3), and (4); (e) (1), (2), (3), (4) (G), (H), and (I),(5), and (8); (f); and (g) of the Privacy Act:

(1) FBI Data Warehouse System, (JUSTICE/FBI-022).

(2) These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(j) and (k). Where compliance with an exempted provision could not appear to interfere with or adversely affect interests of the United States or other system stakeholders, the DOJ in its sole discretion may waive an exemption in whole or in part; exercise of this discretionary waiver prerogative in a particular matter shall not create any entitlement to or expectation of waiver in that matter or any other matter. As a condition of discretionary waiver, the DOJ in its sole discretion may impose any restrictions deemed advisable by the DOJ (including, but not limited to, restrictions on the location, manner, or scope of notice, access or amendment).

(w) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3), the requirement that an accounting be made available to the named subject of a record, because this system is exempt from the access

provisions of subsection (d). Also, because making available to a record subject the accounting of disclosures from records concerning him/her would specifically reveal any law enforcement or national security investigative interest in the individual by the FBI or agencies that are recipients of the disclosures. Revealing this information could compromise ongoing, authorized law enforcement and intelligence efforts, particularly efforts to identify and defuse any potential acts of terrorism or other potential violations of criminal law. Revealing this information could also permit the record subject to obtain valuable insight concerning the information obtained during any investigation and to take measures to circumvent the investigation.

(2) From subsection (c)(4) notification requirements because this system is exempt from the access and amendment provisions of subsection (d) as well as the accounting of disclosures provision of subsection (c)(3).

(3) From subsection (d) (1), (2), (3) and (4), (e)(4)(G) and (H), because these provisions concern individual access to and amendment of law enforcement, intelligence and counterintelligence, and counterterrorism records and compliance could alert the subjection of an authorized law enforcement or intelligence activity about that particular activity and the investigative interest of the FBI and/or other law enforcement or intelligence agencies. Providing access could compromise sensitive information classified to protect national security; disclose information which would constitute an unwarranted invasion of another's personal privacy; reveal a sensitive investigative or intelligence technique; could provide information that would allow a subject to avoid detection or apprehension; or constitute a potential danger to the health or safety of law enforcement personnel, confidential sources, and witnesses. The FBI takes seriously its

obligation to maintain accurate records despite its assertion of this exemption, and to the extent it, in its sole discretion, agrees to permit amendment or correction of FBI records, it will share that information in appropriate cases with subjects of the information.

(4) From subsection (e)(1) because it is not always possible to know in advance what information is relevant and necessary for law enforcement and intelligence purposes. The relevance and utility of certain information that may have a nexus to terrorism or other crimes may not always be evident until and unless it is vetted and matched with other sources of information that are necessarily and lawfully maintained by the FBI.

(5) From subsection (e)(2) and (3) because application of this provision could present a serious impediment to efforts to solve crimes and improve national security. Application of these provisions would put the subject of an investigation on notice of that fact and allow the subject an opportunity to engage in conduct intended to impede that activity or avoid apprehension.

(6) From subsection (e)(4)(I), to the extent that this subsection is interpreted to require more detail regarding the record sources in this system than has been published in the Federal Register. Should the subsection be so interpreted, exemption from this provision is necessary to protect the sources of law enforcement and intelligence information and to protect the privacy and safety of witnesses and informants and others who provide information to the FBI. Further, greater specificity of properly classified records could compromise national security.

(7) From subsection (e)(5) because in the collection of information for authorized law enforcement and intelligence purposes, it is impossible to determine in advance what information is accurate, relevant, timely and complete. With time, seemingly irrelevant

or untimely information may acquire new significance when new details are brought to light. Additionally, the information may aid in establishing patterns of activity and providing criminal or intelligence leads. It could impede investigative progress if it were necessary to assure relevance, accuracy, timeliness and completeness of all information obtained during the scope of an investigation. Further, some of the records in this system come from other agencies and it would be administratively impossible for the FBI to vouch for the compliance of these agencies with this provision.

(8) From subsection (e)(8) because to require individual notice of disclosure of information due to compulsory legal process would pose an impossible administrative burden on the FBI and may alert the subjects of law enforcement investigations, who might be otherwise unaware, to the fact of those investigations.

(9) From subsections (f) and (g) to the extent that the system is exempt from other specific subsections of the Privacy Act.

Dated: June 19, 2012.

Nancy C. Libin
Chief Privacy and Civil Liberties Officer
United States Department of Justice

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